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6 International, LLC dba Esporta Fitness,
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**UNITED STATES DISTRICT COURT
DISTRICT OF ARIZONA**

Reginald Sanders,

Plaintiff,

V.

Fitness International, LLC dba Esporta Fitness, Mimi Oganesian, General Manager, Jena [sic] Thies, Operations Manager,

Defendants.

No. CV-23-cv-00481-MTL

**DEFENDANTS FITNESS
INTERNATIONAL, LLC, THIES
AND OGANESIAN'S MOTION TO
DISMISS PLAINTIFF'S 2ND
AMENDED COMPLAINT FOR A
CIVIL CASE**

Defendants Fitness International, LLC dba Esporta Fitness, Janalee Thies and Mimi Oganesian (hereinafter collectively “Defendants”) move to dismiss all claims asserted against them by Plaintiff’s Second Amended Complaint for a Civil Case for failure to state a claim upon which relief can be granted. This Motion is based on the following Memorandum of Points and Authorities.

MEMORANDUM OF POINTS AND AUTHORITIES

J. FACTUAL AND PROCEDURAL BACKGROUND

In his Second Amended Complaint, Plaintiff alleges three causes of action: (1) Public Accommodation Discrimination Based on Sex, (2) negligence, and (3) retaliation. *See* Pl.'s Second Am. Compl. (Docket No. 7) 3, 9-15. His public accommodations claim is premised on his claim that he was "subjected to discrimination based on his sex or gender" by employees of the Defendant because they did not trespass

1 his ex-girlfriend following a domestic dispute on Defendants property. Pl.’s Second Am.
 2 Compl. 10:25. Additionally, he claims Defendants discriminated against him because they
 3 refused to violate Defendant’s company policy by providing surveillance video directly to
 4 Plaintiff of his domestic dispute. His negligence and retaliation claims are based on the
 5 same factual allegations. Additionally, he claims that Defendants were unprofessional,
 6 harassed him, and created a toxic environment when in fact even taking all the allegations
 7 in Plaintiff’s Complaint as true, at most he was subject to an unprofessional environment
 8 in Defendant’s fitness facility, not discrimination. Plaintiff was never denied service at any
 9 of Defendant’s fitness facility locations, nor does Plaintiff allege as much in his Complaint.
 10 Indeed, he has continued to visit Defendants’ facilities as recently as this month.

11 **II. LEGAL ANALYSIS**

12 **A. Public Accommodations (Discrimination Based on Sex)**

13 Under Title II of the Civil Rights Act of 1964, “[a]ll persons shall be entitled
 14 to the full and equal enjoyment of the goods, services, facilities, privileges, advantages,
 15 and accommodations of any place of public accommodation, as defined in this section,
 16 without discrimination or segregation on the ground of race, color, religion, or national
 17 origin.” 42 U.S.C. § 2000a(b). The Arizona Civil Rights act is essentially the same. A.R.S.
 18 § 41-1442(A) (“Discrimination in places of public accommodation against any person
 19 because of race, color, religion, sex, national origin or ancestry is contrary to the policy of
 20 this state and shall be deemed unlawful.”); A.R.S. § 41-1442(B) (“No person, directly or
 21 indirectly, shall refuse to, withhold from or deny to any person, nor aid in or incite the
 22 refusal to deny or withhold, accommodations, advantages, facilities or privileges thereof
 23 because of race, color, religion, sex, national origin or ancestry, nor shall distinction be
 24 made with respect to any person based on race, color, religion, sex, national origin or
 25 ancestry in connection with the price or quality of any item, goods or services offered by
 26 or at any place of public accommodation.”). And in construing other sections of the
 27 Arizona Civil Rights Act that mirror the Civil Rights Act of 1964, “Arizona courts have
 28 found the federal courts’ construction of the federal statute persuasive.” *York v. JPMorgan*

1 *Chase Bank, National Association*, Case No. CV-18-04039-PHX-SPL, 2019 WL 3802535,
 2 at *5 (D. Ariz. Aug. 13, 2019).

3 With only circumstantial evidence of discrimination, Title II claims are
 4 analyzed under the same *McDonnell-Douglas* burden-shifting framework as Title VII
 5 claims. *See, e.g., Feacher v. Intercontinental Hotels Group*, 563 F. Supp. 2d 389, 402
 6 (N.D.N.Y. 2008). Under this framework, the claimant must show that (1) he is a member
 7 of a protected class, (2) he attempted to contract for certain services, (3) he was denied the
 8 right to contract for those services, and (4) those services remained available to similarly-
 9 situated individuals outside of the claimant’s protected class. *York v. JPMorgan Chase*
 10 *Bank, National Association*, Case No. CV-18-04039-PHX-SPL, 2019 WL 3802535, at *2
 11 (D. Ariz. Aug. 13, 2019). In addition to this, though, the claimant must plausibly show that
 12 the discrimination was intentional. *Evans v. McKay*, 869 F.2d 1341, 1344 (9th Cir. 1989).

13 Here, Plaintiff cannot establish a *prima facie* case of sex discrimination. First
 14 and foremost, and even according to Plaintiff’s Complaint, he was simply never denied the
 15 right to use or utilize Defendants fitness facilities, equipment, or accompanying services.
 16 Nor was his membership revoked or terminated. Plaintiff was and to this day remains a
 17 member of Defendant’s fitness facilities. Plaintiff utilized, and upon information and
 18 belief, still utilizes Defendant’s fitness facilities, the equipment, and the amenities like all
 19 other members. Additionally, even taking all of Plaintiff’s allegations in his Complaint as
 20 true, there is no indication that Plaintiff was discriminated against upon the basis of his sex.
 21 As a result, Plaintiff cannot establish a *prima facie* case, so his claim fails.

22 More importantly, though, even under Plaintiff’s version of events, he was
 23 not subject to sex or gender discrimination under the Arizona Civil Rights Act. Under
 24 Plaintiff’s telling, he was: (1) subjected to “offensive” comments by Defendants Thies
 25 when she stated “[w]hat did you do to her? She seems like a pleasant young lady.” Pl.’s
 26 Second Am. Compl. 10:8-9. Defendant Thies’ remarks are not rude, harassing, or
 27 inappropriate, and this does not as Plaintiff claims, express any bias or discrimination
 28 against Plaintiff based on his sex or gender, implicitly or explicitly. Even taken as true,

1 Defendant Thies is discussing Plaintiff and his relationship with his ex-girlfriend, which
 2 she was exposed to from reviewing the surveillance footage that he requested. She was not
 3 opining on Plaintiff's behavior solely because of his sex. Plaintiff also points to Defendant
 4 Oganesian's statement: “[d]o you think I owe you something? You told me you were dating
 5 a married woman, right? And that's why she's “harassing you?”] To be honest, I feel that
 6 maybe she may have come there to ask you to leave her alone.” Pl.'s Second Am. Compl.
 7 10:14-17. Despite Plaintiff's assertion otherwise, Defendant Oganesian was not exhibiting
 8 implicit bias with this statement, let alone explicit. Defendant Oganesian was not basing
 9 this statement on Plaintiff's sex, but her viewing of the surveillance footage. Footage she
 10 only reviewed because Plaintiff requested as much.

11 Even taking all the allegations in Plaintiff's Complaint as true, these
 12 statements do not constitute discrimination under Title II of the Civil Rights Act or the
 13 Arizona Civil Rights Act. At no point was Plaintiff ever denied service; at most, he received
 14 mere comments on surveillance video that he requested the Defendants to provide him.
 15 This is not enough to constitute denial of service. *See, e.g., Lopez v. Target Corp.*, 676 F.3d
 16 1230, 1231-32 (11th Cir. 2012) (a white cashier telling a Hispanic person that the checkout
 17 line was closed to him while making rude comments and gestures was not sufficient to
 18 establish denial of service). It further is not sufficient enough to show intentional
 19 discrimination based on sex. Even accepting Plaintiff's version of events in the worst
 20 possible context, what he alleges is no more than poor, inattentive service, and an
 21 unwillingness to violate Defendant's company policy, not actionable discrimination under
 22 either Title II of the Civil Rights Act or the Arizona Civil Rights Act. As a result, Plaintiff
 23 cannot make a *prima facie* case of discrimination even as alleged.

24 Here, based on Plaintiff's Complaint, the most that he can allege is that his
 25 ex-girlfriend was not trespass when he requested, he was not directly provided the
 26 surveillance video in question (which again would have violated Defendant Fitness
 27 International's company policy), and that he was subject to comments regarding his
 28 domestic dispute. None of the reasons for any of these events occurring happened because

1 of Plaintiff's sex but were instead based on Defendant Fitness International's policy
 2 regarding providing surveillance video only directly to the police, and Defendants
 3 Oganesian and Thies' review of the surveillance footage and repeated interactions with
 4 Plaintiff. None of these even approaches what could be considered a denial of service. As
 5 a result, Plaintiff's sex discrimination claim fails.

6 **B. Negligence**

7 To maintain an action for negligence, a plaintiff must prove that the
 8 defendant owed a duty of care to the plaintiff, a breach of that duty, actual and proximate
 9 causal connection between defendant's conduct and plaintiff's injury, and actual damage.
 10 *Gipson v. Kasey*, 214 Ariz. 141, 143, 150 P.3d 228, 230 (2007). A court deciding a 12(b)(6)
 11 motion to dismiss should look only to the factual allegations contained within the
 12 complaint. *Orca Communications Unlimited, LLC v. Noder*, 236 Ariz. 180, 181, 337 P.3d
 13 545, 546 (2014).

14 Plaintiff simply has not made an appropriate negligence claim. Plaintiff's
 15 Complaint alleges that Defendants were negligent for failing to prevent the trespass of
 16 Plaintiff's ex-girlfriend. Plaintiff even goes as far as to claim "[the] ex-girlfriend is *no*
 17 *different than an active shooter.*" Pl.'s Second Am. Compl. 11:12 (emphasis added).
 18 Plaintiff cites A.R.S. §§ 12-2505-06 for the purpose of establishing liability for injuries
 19 resulting from negligence. A.R.S. §§ 12-2505-06. Plaintiff mistakenly cites inapplicable
 20 codes from the City of Phoenix in his Complaint, stating they pertain to premises liability
 21 and property owner's duty of care, but instead cites codes that are titled, "[a]ssault and
 22 battery—Prohibited; permissible violence; degree of force permitted," and "[d]isturbing
 23 the peace," respectively. PHOENIX, ARIZ., CITY CODE, § 23-2, 3 (2023). In addition,
 24 Plaintiff cites Phoenix City Code § 23-11, titled "Nuisances." PHOENIX, ARIZ., CITY CODE,
 25 § 23-11 (2023). While Plaintiff is correct in stating that Defendants have a duty to maintain
 26 safe premises for their paying members, Plaintiff states no actionable injury that occurred
 27 from this incident. Plaintiff's Complaint indicates that he suffered **no physical or**
 28 **emotional injury** resulting from Defendants' alleged failures. In addition, Plaintiff in no

1 way alleges within his Complaint that Defendants assaulted him, breached the peace, or
 2 constituted a nuisance. Nor could any close reading of Plaintiff's Complaint be found to
 3 allege such actions, either within the normally accepted meaning of the words or using
 4 statutory construction. To the degree that *any* injury may be found within Plaintiff's
 5 Complaint from this incident, none are actionable injuries under Arizona law.

6 Second, Defendants are under no duty to provide surveillance footage from
 7 their system directly to Plaintiff simply because he desires to obtain the footage. Plaintiff
 8 states a duty not reported anywhere in law, and even if somehow such a duty was breached,
 9 there is no actionable injury to Plaintiff. Defendants have no duty to assist Plaintiff in his
 10 personal suit absent subpoena or police involvement, neither of which was attempted, and
 11 Plaintiff only desired to obtain the surveillance footage in direct violation of Defendant
 12 Fitness International's company policy. Defendants Oganesian and Thies refusal to violate
 13 company policy is not an actionable injury under Arizona law.

14 C. **Retaliation**

15 Plaintiff alleges within his complaint that A.R.S. § 41-1442, Phoenix City
 16 Code § 18-4(B)(2), and 42 U.S.C. § 2000(a-2) prohibit retaliation for discrimination in
 17 public accommodations. While Plaintiff is correct in his recitation of law, as covered in
 18 subsection II A above, since Plaintiff was not denied service by Defendants at any of their
 19 locations, Plaintiff was not discriminated against based on his sex or gender. Since Plaintiff
 20 was not discriminated against by Defendants, Plaintiff's retaliation charge must fail as a
 21 function of law.

22 **III. CONCLUSION**

23 Plaintiff's discrimination claim fails both factually and legally. It fails
 24 factually because even assuming, *ad arguendo*, that Plaintiff was discriminated against, his
 25 treatment was not based on his sex or gender, but his actions and encounters with
 26 Defendants, and their view of him after the domestic dispute. Being in or recovering from
 27 a turbulent personal relationship is not a protected class. It also fails legally because, even
 28 if accepted as true, Plaintiff's story does not support a claim under Title II of the Civil

1 Rights Act or the Arizona Civil Rights Act. Plaintiff's Complaint similarly does not allege
2 any actionable cause of negligence or retaliation, and so must also be dismissed.

3 For these reasons, Defendants respectfully request that Plaintiff's Second
4 Amended Complaint for a Civil Case be dismissed.

5 DATED this 23rd day of October, 2023.

6 JONES, SKELTON & HOCHULI, P.L.C.
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8 By _____
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13 **CERTIFICATE OF SERVICE**

14 I hereby certify that on this 23rd day of October, 2023, I caused the foregoing
15 document to be filed electronically with the Clerk of Court through the CM/ECF System
16 for filing; and served on Plaintiff via the Court's CM/ECF system as well as via U.S. Postal
17 Service.

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21 /s/ Wendy Mungai _____
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